Supreme Court, U.S.
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No. 99-167

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

DOROTHY JOSEPH,

Petitioner,

- v -

THE NYC BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL D. HESS,
Corporation Counsel for the
City of New York,
Attorney for Respondent,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1072

LEONARD KOERNER,*
KRISTIN M. HELMERS,
of Counsel.

August 13, 1999

*Counsel of Record

COUNTER-QUESTION PRESENTED

In holding, in Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994), that the 1991 amendments to Title VII providing an expanded right to damages and a new right to a jury trial were not retroactive and hence could not be applied to a case pending on appeal at the time the amendments became effective, did this Court also necessarily and explicitly reject the idea that the amendments could be applied in a case commenced post-enactment, but based on pre-enactment conduct?

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RELEVANT STATUTORY PROVISIONS

The relevant portions of 42 U.S.C. § 1981a providing for the right to a jury trial where litigants seek the compensatory and punitive damages newly authorized by the Civil Rights Act of 1991 are set forth on pages 8-9 of the instant Petition for a Writ of Certiorari ("Petition"), to which the Court is respectfully referred.

STATEMENT OF THE CASE

1. Factual Background

Petitioner was employed by the respondent Board of Education for many years before being appointed the principal of P.S. 27, in Red Hook, Brooklyn, in 1987 (JA186-205).[1] P.S. 27 is in Community School District 15 and the Superintendent of District 15 at all relevant times, and who also was appointed in 1987, was William Casey (JA467-68). The usual probationary period for a principal is three years (JA559). In 1990, after petitioner had completed three years as principal at P.S. 27, petitioner and Mr. Casey agreed to extend petitioner's probationary period for one additional year (831).

In 1991, after petitioner had completed four years as probationary principal at P.S. 27, Mr. Casey denied tenure to petitioner (JA856). The body of the June 21, 1991 letter from Mr. Casey to petitioner communicating this decision reads in full as follows (JA29):

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[1] Numbers in parentheses prefixed by the letters "JA" refer to pages in the Joint Appendix submitted on the appeal to the Court of Appeals. Numbers prefixed by "App." refer to the appendix to the instant Petition.

> This letter is to inform you that in accordance with Section 2573 Subdivision [sic] of the State Education Law, I am denying your Certification of Completion of Probation in Community School District 15.
>
> Under the collective bargaining agreement between the Board of Education and the Council of Supervisors and Administrators, you are entitled to the review procedure before the Chancellor as prescribed in Article 5, Section 5.3.4C of the By-laws of the Board of Education.
>
> Please be advised that your service under this appointment shall terminate as of the close of business on August 25, 1991.

Section 5.3.4C of the by-laws contains procedural provisions only, i.e., it grants no substantive rights (JA38).

Pursuant to the By-laws, the Chancellor appointed a committee of three individuals to hear petitioner's challenge to the denial of tenure (JA40). That committee held hearings in November and December of 1991 and recommended that the Chancellor concur with Mr. Casey's determination (JA40-51). On February 4, 1992, the Chancellor issued a letter stating that he concurred with the recommendation of the committee (JA52). On February 13, 1992, Mr. Casey sent petitioner a letter in which he stated that he had reviewed the report of the Chancellor's committee and that he was "reaffirming my previous action in denying your certification of completion of probation" (JA53).

Meanwhile, on August 16, 1991, petitioner and the respondent Board had entered into an agreement that permitted petitioner to take advantage of respondent's early retirement program while maintaining her challenge to her denial of tenure, rather than continuing in her former tenured position of assistant principal (JA30-32). In other words, the Board permitted petitioner to retire and agreed not to argue that any administrative or judicial action brought by petitioner would be moot because of her retirement (JA31). In addition, that agreement states in part (JA31):

> In the event that [petitioner] is successful in a review of the denial of satisfactory completion of her probationary service pursuant to Article 5.3.4 of the by-laws of the Board of Education or any subsequent final court proceeding, the Chancellor will recommend to the Superintendent of Community School District 15 that he reconsider his decision to deny her satisfactory completion of her probationary service and that the Superintendent of Community School District 15 consider a request by Ms. Joseph to rescind her retirement.

2. The Proceedings Below

On or about March 6, 1992, petitioner filed a complaint of discrimination in employment with the New York State Division of Human Rights (JA54-56). That complaint states in part, "On June 21, 1991, I received notification that my tenure was denied" (JA55).

Over two years later, on or about June 24, 1994, petitioner commenced suit against the respondent Board of Education in the United States District Court for the Eastern District of New York (JA13-20). She sought, inter alia, compensatory and punitive damages (JA13) for alleged discriminatory employment practices in connection with her service as a probationary principal during the period beginning with her appointment as principal in 1987 and ending with her retirement in August 1991 (JA15). The complaint states, in pertinent part, "Plaintiff was notified that she was being denied tenure on June 21, 1991, and left her employment in August 1991" (JA15). Far from alleging that discrimination occurred beyond this period, the complaint does not even mention the review process undertaken by the Chancellor's committee in November and December of 1991, the Chancellor's February 1992 approval of the committee's report, or the district superintendent's "reaffirmation," also in February 1992, of his June 1991 decision to deny tenure.

By notice of motion dated July 18, 1996 (JA26) and filed December 24, 1996 (JA85), the respondent Board moved to strike petitioner's jury demand and claims for compensatory and punitive damages. That relief was granted by the District Court in an unreported memorandum and order dated February 3, 1997 (JA85p-85w) (copy annexed hereto as Appendix A).

After the conclusion of a 4-day bench trial in January 1998 (JA99-857), the District Court entered judgment in favor of the respondent Board on or about February 2, 1998 (App. 35). By notice of appeal dated February 27, 1998, petitioner appealed both from the February 3, 1997 memorandum and order striking her jury

demand and claims for compensatory and punitive damages, and from the February 2, 1998 final judgment on the merits in the Board's favor (JA85-x). In a March 16, 1999 decision, reported at 171 F.3d 87 (App. 1-32), the U.S. Court of Appeals for the Second Circuit found petitioner's arguments without merit and unanimously affirmed the District Court's judgment (App. 32).

OPINIONS BELOW

1. The District Court's Unpublished Decision on the Motion to Strike the Demand for a Jury Trial and the Claims for and Compensatory and Punitive Damages[2]

The District Court (Gleason, D.C.J.) ruled that petitioner was not entitled to trial by jury, nor to assert claims for compensatory or punitive damages, because her cause of action arose before the November 21, 1991 effective date of the amendments to Title VII which first gave plaintiffs in Title VII cases the right to a jury trial and to compensatory and punitive damages in some circumstances (Appendix A, infra, at 14-21). Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C.

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[2] The instant Petition annexes only a copy of the pages of the transcript of the bench trial containing closing arguments and the District Court's findings of fact and conclusions of law as to petitioner's substantive claims (App. 37-93), which petitioner does not contend need further review by this Court. The jury trial/damages issue was addressed by the District Court in its unpublished memorandum decision of February 3, 1998, annexed hereto as Appendix A.

§ 1981[a]); Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994). The Court, citing Miller v. International Telephone and Telegraph, 755 F.2d 20, 23 (2d Cir., 1985), stated that a claim such as petitioner's ripens when the plaintiff receives definite notice of discharge (id. at 16).

The District Court, focusing its analysis on the accrual issue,[3] began by quoting section 2573[6] of the New York Education Law, which reads in part as follows:

> In a city having a population of four hundred thousand or more, at the expiration of the probationary term of any persons appointed for such term, the superintendent of schools shall make a written report to the board of education recommending for permanent appointment those persons who have been found satisfactory and such board of education shall immediately thereafter issue to such persons permanent certificates of appointment.

Id. at 17. The Court noted that with the decentralization of the New York City schools, the powers of the superintendent as here relevant were transferred to the district superintendents (id. at 17, n.4).

The Court then held that under both a literal reading of this statute, and decisions of the New York State Court

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[3] The Court observed that "[b]oth parties agree that in order for plaintiff to be entitled to the benefits of the 1991 Amendments, her claim must have ripened after November 21, 1991" (id. at 17).

of Appeals, "the decision not to retain a principal beyond the probationary period is within the sole province of the district superintendent" (id. at 17). The Court also noted that the pedagogical review manual submitted by petitioner clearly states that tenure decisions of district superintendents are final and that the district superintendent can adhere to his or her initial denial regardless of the recommendation of the Chancellor (id. at 18-19).

The Court rejected petitioner's arguments that the denial of tenure was not a final decision until all reviews had been exhausted and that her claim did not accrue until a reasonable person would have known that her rights had been violated (see id. at 19). The District Court followed Delaware State College v. Ricks, 449 U.S. 250 (1980), in which this Court held that an employment discrimination claim accrued when a professor was denied tenure and not when his grievance concerning the denial of tenure was denied (id. at 19-20). The Court noted that petitioner claimed only race discrimination by Mr. Casey and did not claim any racial animus on the part of the Chancellor (id. at 20). The Court also found that petitioner was aware that the June 21, 1991 denial by Mr. Casey was final, both because her experience of over 30 years in the school system indicates that she was aware of the rules governing the tenure process, and because in her complaint to the State Division of Human Rights she identified June 21, 1991 as the date of the discriminatory act and the date of the most recent discriminatory activity (id. at 20).

2. The Decision of the Court of Appeals on the Same Issue, Reported at 171 F.3d 87

After reviewing in detail the District Court's reasons for rejecting petitioner's claimed right to a jury trial and to compensatory and punitive damages, 171 F.3d 87, 89-90, the Court of Appeals agreed that, in Landgraf v. U.S.I. Film Products, supra, this Court had specifically ruled that the provisions of 42 U.S.C. § 1981a providing for enhanced money damages do not apply "to conduct occurring before November 21, 1991," i.e., to cases arising prior to enactment of the 1991 amendments. 171 F.3d at 91, citing Landgraf, 511 U.S. at 282-286. Following this Court's reason in Landgraf, 511 U.S. at 281, the Court of Appeals further concluded that, "[s]ince the right to a jury trial is expressly linked [in the legislation] to a request for damages allowable under § 1981a, the right to a jury trial also does not apply when the conduct complained of occurred prior to November 21, 1991." 171 F.3d at 91.

Turning next to petitioner's claim that the complained-of conduct "was not completed until February 4, 1992, at the earliest, when the Chancellor concurred in Casey's decision not to grant [petitioner] tenure," 171 F.3d at 91, the Court of Appeals rejected that proposition, holding that the law is squarely to the contrary. Id. The Court observed that in Delaware State College v. Ricks, 449 U.S. 250, 258-259 (1980), this Court had specifically held that "[a] claim under Title VII for discriminatory denial of tenure arises when the employee receives definite notice of the tenure decision," 171 F.3d at 91, "even if the actual discharge date is later, ... and even if the tenure denial is subject to a grievance procedure, administrative review, and possible reversal ..." Id. (specific page

citations to Ricks omitted). Like the District Court, the Court of Appeals found the conclusion in Ricks even more compelling here because, under New York law, "the reviews of the district superintendent's denial of tenure to a probationary principal are entirely advisory." 171 F.3d at 92. Accordingly, the Court held as follows (id.):

> Casey's decision to deny [petitioner] tenure and terminate her appointment as P.S. 27's principal was final as of the time it was made in June 1991. His February 1992 letter to Joseph reaffirming that decision did not make his decision any less final. Since [petitioner] has not asserted any claim that discriminatory conduct occurred after November 21, 1991, the district court properly struck her demand for a jury trial.

REASONS FOR DENYING THE WRIT

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT HAS ALREADY HELD THAT THE 1991 AMENDMENTS TO TITLE VII PROVIDING FOR THE RIGHT TO A JURY TRIAL DO NOT APPLY TO PRE-ENACTMENT CONDUCT.

We note, as a preliminary matter, that although petitioner ostensibly asks this Court to review three questions (Petition at i), these reduce to a single legal issue, to wit, whether this Court's decision in Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994), holding that the jury trial option and compensatory and punitive damages

provisions contained in 42 U.S.C. § 1981a are prospective only, is controlling where a Title VII claim is based on conduct engaged in prior to enactment of the 1991 amendments to that statute, but where suit was not commenced until after the legislation's November 21, 1991 effective date (Petition at i, Question 3). In framing the issue in terms of pre-amendment conduct, petitioner has effectively conceded that the courts below were correct in determining that her cause of action accrued upon her receipt of the June 21, 1991 pre-enactment letter informing her that she had been denied tenure and not upon completion of the review process in February 1992.

Thus, notwithstanding the fact that petitioner claims in her argument section, without elaboration, that the Court of Appeals somehow erred in holding that her claim accrued in June 1991 and not in February 1992 (Petition at 6-7), that alleged error is not, by her own definition, one of the questions proposed for review by this Court.[4]

Turning to the Landgraf issue as framed in the Petition's "Questions Presented" section (Petition at i), it is apparently petitioner's position that that decision is inapplicable because suit had been commenced in Landgraf prior to enactment of the 1991 amendments, whereas here petitioner's complaint -- although, as discussed above,

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[4] Should the Court not agree that petitioner has conceded this issue, we rely on the reasoning of the District Court and the Court of Appeals and submit that petitioner has failed to demonstrate the nature of any claimed error in their analysis of the proper accrual date under Delaware State College v. Ricks, 449 U.S. 250 (1980) and New York law.

concededly based on pre-enactment conduct -- was filed after the effective date of the legislation. Given that this Court specifically held in Landgraf that the new damages remedy in the 1991 amendments, and the jury-trial option attached to it, "is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent," 511 U.S. at 281-282, and given that this Court could not find any such intent despite an exhaustive search, petitioner focuses on a distinction without a difference. No one but petitioner could dispute that this Court unequivocally held in Landgraf that the dispositive factor in its retroactivity analysis was when the claimed discriminatory conduct occurred, not when suit was commenced. There is no question that, under Landgraf, the right to a jury trial provided to Title VII litigants seeking compensatory and punitive damages under the 1991 amendments is simply not available where claims are based on pre-enactment conduct. Petitioner's attempt to argue otherwise -- bolstered, without a single citation, by the conclusory claim that the decision below "is contrary to the holdings of some other circuits and other district courts" (Petition at i., 6) -- borders, we submit, on the frivolous.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL D. HESS,
Corporation Counsel of the
City of New York,
Attorney for Respondent.

LEONARD J. KOERNER,*
KRISTIN M. HELMERS,
of Counsel.

August 13, 1999

*Counsel of Record

APPENDIX A

February 3, 1997 Memorandum and Order of the U.S. District Court for the Eastern District of New York Granting Respondent's Motion to Strike Petitioner's Jury Demand and Claim for Compensatory and Punitive Damages.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DOROTHY JOSEPH,

Plaintiff,

- against -

NEW YORK CITY BOARD OF EDUCATION,

Defendant.

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NOT FOR PUBLICATION

MEMORANDUM AND ORDER

94-CV-3025 (JG)

APPEARANCES:

RICHARD M. NAGER
Attorney for Plaintiff
370 Lexington Avenue, Suite 907
New York, New York 10017

PAUL A. CROTTY
Corporation Counsel for the
City of New York
Attorney for Defendant
100 Church Street, Room 2-106
New York, New York 10007
BY: BRIGETTE DUFFY

JOHN GLEESON, United States District Judge:

On June 24, 1994, plaintiff, an African-American woman, filed the complaint in this action, claiming that she was terminated from her employment due to her race. Defendant moves to strike plaintiff's jury demand and claim for compensatory and punitive damages. For the reasons set forth below, defendant's motion is granted.

FACTS

Plaintiff, Dorothy Joseph, was employed by the defendant New York City Board of Education from 1956 until August, 1991. When first hired, plaintiff was a classroom teacher. She continued to work as a teacher, assistant principal, and acting principal until September 1, 1987, when she was made principal of Public School 27 ("P.S. 27"), an elementary school in Brooklyn. P.S. 27 is under the auspices of Community School District 15.

By letter dated June 21, 1991, Joseph was notified by William Casey, Superintendent of Community School District 15, that her Certification of Completion of Probation, which provides a principal with tenure, had been denied. Plaintiff was further instructed that her employment as principal of P.S. 27 would terminate as of the close of

business on August 25, 1991. Shortly thereafter, the decision was ratified by the Community School Board.

Pursuant to the terms of the collective bargaining agreement between the Board of Education and the Council of Supervisors and Administrators, which represents principals employed by the Board of Education, Joseph's denial of tenure was subject to "review" by the Chancellor of the Board of Education. This review was performed by a committee appointed by the Chancellor on November 8, 12 and 15, and December 3, 1991. The committee elected to ratify the decision of Superintendent Casey. The Chancellor signed off on the committee's recommendation on January 31, 1992. Superintendent Casey reaffirmed his decision in a letter to Joseph dated February 13, 1992.

Plaintiff alleges that Casey's decision to deny her tenure was motivated by racial animus. Joseph first brought her complaint to the New York State Division of Human Rights on March 6, 1992. Plaintiff received a right to sue letter from the Equal Employment Opportunity Commission on March 28, 1994.

On June 24, 1994, plaintiff filed the complaint in this case. In the complaint, Joseph alleges that there was a pattern of discriminatory actions by Superintendent Casey, including the denial of resources and cooperation from the Community School District office. Plaintiff states that these actions were designed to create inferior conditions at her school and poor performance by her students, so that the Superintendent would have reason to deny plaintiff tenure and to unlawfully terminate her employment. Plaintiff seeks injunctive and declaratory relief, along with compensatory and punitive damages pursuant to 42 U.S.C.

2000(e) et seq. ("Title VII"). Plaintiff also seeks costs and attorneys' fees, as authorized by 42 U.S.C. 2000e-5(k).

Defendant filed a motion on December 24, 1996, to strike the plaintiff's jury demand and the demand for compensatory and punitive damages.

DISCUSSION

Originally, plaintiffs in Title VII actions did not have a right to demand a jury trial. Wrensen v. City of New York, 826 F. Supp. 698, 699, 700 (S.D.N.Y. 1993). Title VII plaintiffs were also not entitled to compensatory, punitive or other damage awards other than for back pay and benefits. Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483, 1490 (1994). However, Title VII was amended on November 21, 1991, to allow plaintiffs the right to a jury trial and compensatory and punitive damages in some circumstances. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended 42 U.S.C. § 1981 and added at 42 U.S.C. § 1981(a) (1992)) ("1991 Amendments"). The 1991 Amendments do not apply retroactively, so in order for a plaintiff to be entitled to a jury trial, along with compensatory and punitive damages, the cause of action must have arisen after the enactment of the Amendments. Landgraf, 114 S.Ct. at 1508.

Both parties agree that in order for plaintiff to be entitled to the benefits of the 1991 Amendments, her claim must have ripened after November 21, 1991. A claim ripens when the plaintiff receives definite notice of discharge. Miller v. International Telephone and Telegraph, 755 F.2d 20, 23 (2d Cir. 1985). The question

presented is whether plaintiff received such notice prior to November 21, 1991.

The New York State Education Law, § 2573(6), states:

> In a city having a population of four hundred thousand or more, at the expiration of the probationary term of any persons appointed for such term, the superintendent of schools shall make a written report to the board of education recommending for permanent appointment those persons who have been found satisfactory and such board of education shall immediately thereafter issue to such persons permanent certificates of appointment.[5]

N.Y. Educ. Law § 2573(6) (McKinney 1994).

Under a literal reading of this law, the decision not to retain a principal beyond the probationary period is within the sole province of the district superintendent.

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[5] When originally written in 1935, § 2573 vested these powers in the central board of education and its superintendent, the predecessor to the current Chancellor. However, with the 1969 decentralization of the New York City schools, these powers were transferred to the district superintendents and community school boards. See Matter of Caraballo v. Community School Bd. Dist. 3, 49 N.Y.2d 488, 491-92, 426 N.Y.S.2d 974, 975-76 (1980) and N.Y. Educ. Law § 2590-f(6)a (McKinney 1994).

Section 2573 contains no provision for review or reversal of these decisions by the chancellor of the central board.

Additionally, the New York State Court of Appeals has repeatedly examined this provision of the Education Law and has clearly stated that the law applies as written. The discretion to grant tenure to a principal upon completion of the probationary period lies exclusively with the district superintendents. Matter of Taylor v. Berberian, 61 N.Y.2d 613, 471 N.Y.S.2d 843 (N.Y. 1983). The language of § 2573 also denotes a duty on the party of the community school board to comply with the tenure recommendations of the superintendent. Matter of Caraballo v. Community School Bd. Dist. 3, 49 N.Y.2d 488, 492-93, 426 N.Y.S.2d 974, 976 (N.Y. 1980).[6]

Additionally, Joseph has submitted a portion of the Board of Education Pedagogical Review Manual, published by the Board's Office of Appeals and Reviews. This manual clearly states that tenure decisions of district superintendents are final. See Plaintiff's Exhibit G at 25. The manual does not state that the findings of these reviews, subsequent votes by the local board, or recommendations of reversal by the Chancellor are binding upon the district superintendent. Indeed, the manual states

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[6] The plaintiff in Caraballo was an elementary school principal who was "recommended" for tenure by the district superintendent. However, the district school board refused to issue the Certification of Appointment officially granting tenure. The Court of Appeals held that the district school board's function was essentially ministerial, and thus it could not reverse the decision of the district superintendent. Caraballo, 49 N.Y.2d at 492.

that the district superintendent can stand on his or her original decision, regardless of the recommendations of the Chancellor's report. See Plaintiff's Exhibit G at 30. Based upon the applicable law, its interpretation by the Court of Appeals, and the internal regulations of the Board of Education, plaintiff was terminated pursuant to the June 21, 1991 letter.[7]

Plaintiff claims that she could not have known that the decision was "final" until all "reviews" had been exhausted. As § 2573 demonstrates, state law is clear that the decision was final at the time it was made by the superintendent. Joseph believes that a "reasonable person" would not have known that his rights had been violated at the time of the superintendent's initial notification.

Defendant responds by citing Delaware State College v. Ricks, 449 U.S. 250 (1980). In Ricks, a college professor was notified of a denial of tenure and filed a grievance challenging the decision. The Court held that a discrimination action ripened when the Ricks plaintiff was notified that he was not getting tenure, not when the grievance was denied. Hearing a grievance or an appeal is an effort to change a prior decision, not to influence the decision before it is made. Id. at 261. Aspirants for academic tenure should not ignore available opportunities to request reconsideration, but such requests cannot extend the

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[7] Even if this court were to allow the plaintiff to use her actual discharge date, August 25, 1991, as the date when her claims ripened, that date is still prior to the enactment of the 1991 Amendments, so she still would not be entitled to a jury trial or to claim compensatory or punitive damages beyond back pay.

limitations periods applicable to civil rights laws. Id. at 261, n.15.

As in the Ricks case, Joseph was denied tenure and was given the opportunity for review by another body. In both instances, the discriminatory action took place when the tenure decision was made, not when collateral reviews became final. This initial denial of tenure is the wrong for which plaintiff seeks a remedy. Indeed, Joseph does not complain about discriminatory animus by the central board or the Chancellor. If plaintiff was the victim of discrimination, she clearly knew about it when she received the June 21 letter.

In addition, plaintiff was apparently aware that the June 21, 1991 termination decision was final. She was employed for over thirty years in the New York City school system, and she had served as a teacher, guidance counselor, acting high school principal, central office director and tenured assistant principal. Her extensive experience indicates that she was aware of the rules governing the tenure process. Indeed, in her complaint in this case and to the New York State Division of Human Rights plaintiff identified June 21, 1991 -- the date of Superintendent Casey's decision -- as date of the discriminatory act and the date of the most recent discriminatory activity.

CONCLUSION

For the foregoing reasons, defendant's motion to strike plaintiff's jury demand and claim for compensatory and punitive damages is granted.

So Ordered,

JOHN GLEESON
U.S. DISTRICT JUDGE

Dated: February 3, 1997
Brooklyn, New York